IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 15, 2000 Session

STATE OF TENNESSEE v. KEVIN DOUGLAS DAVIS

Direct Appeal from the Criminal Court for Davidson County
No. 98-D-2643 Cheryl A. Blackburn, Judge

No. M2000-00017-CCA-R3-CD - Filed July 3, 2001

The appellant appeals his conviction by a jury in the Davidson County Criminal Court of one count of assault. The appellant asserts that his conviction should be reversed and his case remanded for a new trial due to the trial court's failure to instruct the jury in accordance with Tenn. Code Ann. § 39-11-611(b) (1997) and the prosecutor's failure to disclose exculpatory evidence. Because we agree with the appellant that the trial court failed to fully instruct the jury on the justification of self-defense and because reasonable doubt exists that the error was harmless, we grant the requested relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Reversed and Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

Jeffery S. Frensley and Anthony Adgent, Nashville, Tennessee, for the appellant, Kevin Douglas Davis.

Paul G. Summers, Attorney General and Reporter; Russell S. Baldwin, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Roger D. Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I.

On November 5, 1998, a Davidson County Grand Jury returned an indictment charging the appellant, Kevin Douglas Davis, with the aggravated assault of his wife's stepfather, William Max Nichols, by using or displaying a deadly weapon and the simple assault of his wife's mother, Janice Roberts Nichols. The indictment arose from an altercation between the appellant and his wife's parents concerning the care and custody of his wife's one-year-old child. On August 16, 1999, the appellant's case proceeded to trial, at the conclusion of which a jury convicted the

appellant of the simple assault of Mr. Nichols. In accordance with the jury's verdict of guilt, the trial court sentenced the appellant to eleven months and twenty-nine days in the Davidson County Jail, assigning a release eligibility percentage of seventy-five percent.

The altercation underlying the appellant's conviction occurred on March 19, 1998, at the home that the appellant shared with his wife. The testimony adduced at the appellant's trial established two conflicting versions of the altercation. First, the Nicholses testified that the appellant assaulted Mr. Nichols with a flashlight as the victim stood on the Davises' front porch. Mr. Nichols fell through the front door into the Davises' home, where the appellant continued his assault with the flashlight. Additionally, the appellant attempted to "gouge[] [Mr. Nichols'] eyeballs with his thumb just as hard as he could." At some point, Mrs. Nichols attempted to intervene. However, the appellant only desisted when Mr. Nichols seized the appellant "in the groin." As a result of the appellant's assault, Mr. Nichols received more than one hundred stitches to his head and underwent surgery on one eye. Mr. Nichols testified at trial that his vision is permanently impaired.

In contrast to the Nicholses' account of the altercation, the appellant presented testimony that the Nicholses forcibly and without permission entered the Davises' home, and Mr. Nichols assaulted the appellant with a flashlight. The appellant in turn seized the flashlight from Mr. Nichols and used it to defend himself. Mrs. Nichols then joined the assault, "trying to scratch [the appellant's] eyes out." According to the appellant, the fight concluded in a stalemate. Officer Kjihara of the Metropolitan Nashville Police Department interviewed the appellant immediately following the altercation and confirmed at the appellant's trial that the appellant's head was bleeding, and the appellant's shirt was torn and blood-stained. The appellant's wife additionally asserted at trial that the appellant "had scratches, [a] big huge gash under his eye, blood, and the beginning of a big bump on his head." The appellant asserted, "I was defending my life and my family's health and well being to the best of my ability because I had a true and great fear for my life."

The trial court in this case instructed the jury on the justification of self-defense as set forth in subsection (a) of Tenn. Code Ann. § 39-11-611 (1997).[1] See also T.P.I. Crim. No. 40.06 (4th ed. 1995). That subsection provides:

> A person is justified in threatening or using force against another person when and to the degree the person reasonably believes the force is immediately necessary to protect against the other's use or attempted use of unlawful force. The person must have a reasonable

[1] The record does not include the transcript of the jury instructions as actually given; instead, the typewritten instructions are included in the technical record. This court has previously suggested that a failure to include the transcript may waive review of appellate issues pertaining to jury instructions "because without a complete record, it is impossible for this court to discern whether the written jury instructions conform to the instructions as read to the jury." State v. Thomas Mitchell, No. W1998-00509-CCA-R3-CD, 1999 WL 1531758, at *4 n. 2 (Tenn. Crim. App. at Jackson, December 20, 1999), perm. to appeal denied, (Tenn. 2000). Nevertheless, as neither party in the instant case disputes the accuracy of the typewritten instructions, we will review the appellant's challenge to the trial court's jury instructions.

> belief that there is an imminent danger of death or serious bodily injury. The danger creating the belief of imminent death or serious bodily injury must be real, or honestly believed to be real at the time, and must be founded upon reasonable grounds. There is no duty to retreat before a person threatens or uses force.

Tenn. Code Ann. § 39-11-611(a). However, over the appellant's objection, the trial court omitted an instruction pursuant to subsection (b) of Tenn. Code Ann. § 39-11-611, which provides:

> Any person using force intended or likely to cause death or serious bodily injury within the person's own residence is presumed to have held a reasonable fear of imminent peril of death or serious bodily injury to self, family or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence, and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred.

The trial court reasoned that this instruction was not applicable to the appellant's case because the Nicholses were members of the appellant's "family." On appeal, the appellant first challenges the trial court's interpretation of Tenn. Code Ann. § 39-11-611(b).

II.

The Sixth Amendment to the United States Constitution and Article 1, Section 6 of the Tennessee Constitution guarantee a criminally accused the right to a trial by jury. Recently, our supreme court observed that,

> [i]n Tennessee, this right dictates that all issues of fact be tried and determined by twelve jurors. Thus, it follows that a defendant has a right to a correct and complete charge of the law, so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions.

State v. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000)(citations omitted); See also State v. Watson, 1 S.W.3d 676, 677-678 (Tenn. Crim. App. 1999); State v. Green, 995 S.W.2d 591, 604-605 (Tenn. Crim. App. 1998); State v. Vincent Sims, No. W1998-00634-SC-DDT-DD, 2001 WL 378686, at *4 (Tenn. at Jackson, April 17, 2001)(publication pending). Correspondingly, this court has added that "due process requires that a criminal defendant be afforded a meaningful opportunity to present a complete defense, which includes the right to have the jury instructed regarding fundamental defenses raised by the evidence." State v. Michael S. Nevens, No. M2000-00815-CCA-R3-CD, 2001 WL 430602, at *6 (Tenn. Crim. App. at Nashville, April 27, 2001); see also Tenn. Code Ann. § 39-11-203(c) & (d) (1997).

Whether the evidence has raised a defense and, therefore, requires a jury instruction by the trial court depends upon an examination of the evidence in a light most favorable to the defendant. State v. Bult, 989 S.W.2d 730, 733 (Tenn. Crim. App. 1998). In the instant case, it is undisputed that the evidence adduced at trial raised the defense or justification of self-defense as set forth in subsection (a) of Tenn. Code Ann. § 39-11-611, and the trial court instructed the jury

accordingly. Again, the dispute between the parties lies in the applicability of subsection (b) of Tenn. Code Ann. § 39-11-611, the provision relating to a defendant's use of force in his own residence against another person, "not a member of the family or household," and the accompanying presumption that the defendant "held a reasonable fear of imminent peril of death or serious bodily injury to self, family or a member of the household." Id. The crux of the dispute is not the contents of the evidence adduced at trial but rather the meaning of the statutory language "not a member of the family or household" and, in particular, the term "family."

The appellant argues on appeal that the legislature intended the term "family" to encompass only those members of a defendant's family "living in the house . . . [and possessing] just as much right to be on the premises as the [defendant]." Thus, the appellant argues that his relationship to the Nicholses should not have precluded him from receiving the benefit of the presumption set forth in Tenn. Code Ann. § 39-11-611(b). The State responds that "the legislative intent of [Tenn. Code Ann. § 39-11-611(b)] was to create the presumption that a defendant had reasonable fear when confronted in his home by a stranger - not when confronted by a person that he recognizes as family." As already noted, the trial court adopted the State's broader interpretation of the term "family" in refusing to instruct the jury pursuant to Tenn. Code Ann. § 39-11-611(b).

Because the construction of a statute is a question of law, appellate courts review a trial court's construction de novo, without a presumption of correctness. Bryant v. HCA Health Services of N. Tennessee, Inc., 15 S.W.3d 804, 809 (Tenn. 2000). In conducting our de novo review, we are guided by several rules of statutory construction. First, Tenn. Code Ann. § 39-11-104 (1997) directs this court to construe the provisions of the criminal code "according to the fair import of their terms." See also State v. Charles E. Kilpatrick, Jr., No. M1999-01121-CCA-R3-CD, 2000 WL 804672, at *3 (Tenn. Crim. App. at Nashville, June 23, 2000), perm. to appeal denied, (Tenn. 2001)("Criminal statutes are to be fairly interpreted, and strict construction is not required . . . ."). Consistent with this directive, our supreme court has observed:

> The foundation of statutory construction is to ascertain and give effect to the intention and purpose of the legislature. This legislative intent or purpose is to be ascertained primarily from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language.

Garrison, 40 S.W.3d at 433 n.8 (citation omitted). The natural and ordinary meaning of individual words or phrases included in a statute cannot be divorced from the context in which the words or phrases are used. State v. Flemming, 19 S.W.3d 195, 197 (Tenn. 2000). Moreover, if language is ambiguous even when viewed in the context of the entire statute, this court will resort to an examination of the statutory scheme as a whole, as well as legislative history, to discern its meaning. Bowden v. Memphis Bd. of Educ., 29 S.W.3d 462, 465 (Tenn. 2000); State v. Pendergrass, 13 S.W.3d 389, 394 (Tenn. Crim. App. 1999), perm. to appeal denied, (Tenn. 2000).

With these principles in mind, we conclude that the word "family" in the context of Tenn. Code Ann. § 39-11-611(b) unambiguously refers to those members of a "family" residing within the same residence. In reaching this conclusion, we acknowledge that WEBSTER'S THIRD NEW

INTERNATIONAL DICTIONARY 821 (1993) defines the term "family" in ways ranging from "a group of persons of common ancestry" to "a group of individuals living under one roof." Similarly, BLACK'S LAW DICTIONARY 620 (7th ed. 1999) provides the following definitions of "family": "A group consisting of parents and their children"; "A group of persons connected by blood, by affinity, or by law"; "A group of persons, [usually] relatives, who live together." Nevertheless, we believe that the plain language of Tenn. Code Ann. § 39-11-611(b) reflects the legislature's intent to afford protection to occupants of a residence confronted by "an *intruder* in the residence," regardless of the occupant's relationship to the intruder. Id., Sentencing Commission Comments (emphasis added); see also State v. Darrell Lee Emerson, No. 02C01-9312-CC-00276, 1998 WL 106225, at *7 (Tenn. Crim. App. at Jackson, March 12, 1998); cf. People v. Brown, 8 Cal. Rptr.2d 513, 516 (Cal. Ct. App. 1992)(interpreting a statute contained in the California Penal Code that is identical to Tenn. Code Ann. § 39-11-611(b)). Just as a "family" member who resides in the residence is not, by definition, an intruder, an estranged or unknown "family" member who "unlawfully and forcibly enters . . . the residence" is clearly an intruder. To conclude that Tenn. Code Ann. § 39-11-611(b) provides no protection to the occupant of a residence under the latter circumstances would be absurd. Fleming, 19 S.W.3d at 197.

Our conclusion is buttressed by the legislature's provision in the statute of the alternative term "household" to signify the absence of any presumption when a defendant employs force not only against "family" members living in the residence but also against unrelated occupants. Again, the determinative factor is not the relationship between the defendant and the "victim" but instead whether or not the "victim" is an intruder in the residence.

Having concluded that the appellant's relationship to the Nicholses did not preclude his enjoyment of the presumption set forth in Tenn. Code Ann. § 39-11-611, we must now address the State's contention that the trial court's omission of the requisite instruction constitutes harmless error. The burden is on the State to show that the error is harmless beyond a reasonable doubt. Nevens, No. M2000-00815-CCA-R3-CD, 2001 WL 430602, at *6; State v. Michael Ray Swan, No. M2000-00539-CCA-R3-CD, 2001 WL 430601, at *6 (Tenn. Crim. App. at Nashville, April 27, 2001). In this regard, we acknowledge that the trial court correctly provided the following instructions to the jury:

> The law presumes that the defendant is innocent of the charge against him. This presumption remains with the defendant throughout every stage of the trial, and it is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.
>
> The state has the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden never shifts but remains on the state throughout the trial of the case. The defendant is not required to prove his innocence.
>
> . . . .

> Included in the defendant's plea of not guilty is his plea of self-defense.
>
> . . . .
>
> If evidence is introduced supporting self-defense, the burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self-defense.
>
> If from all the facts and circumstances you find the defendant acted in self-defense, or if you have a reasonable doubt as to whether the defendant acted in self-defense, you must find him not guilty.

In short, the trial court properly instructed the jury that the State carried the burden of proving beyond a reasonable doubt that the appellant did not act in self-defense. See, e.g., Sims, No. W1998-00634-SC-DDT-DD, 2001 WL 378686, at *6. Thus, arguably, an instruction concerning the presumption set forth in Tenn. Code Ann. § 39-11-611(b) would merely have emphasized the presumption of self-defense already enjoyed by the appellant.

Nevertheless, we have previously held that "the word 'presumption' in any legal context commands unusual respect" and, therefore, declined to find harmless error in the trial court's omission of an instruction pursuant to the substantially identical predecessor statute to Tenn. Code Ann. § 39-11-611(b). State v. Charles T. Edwards, No. 01C01-9007-CR-00171, 1991 WL 165819, at *4 (Tenn. Crim. App. at Nashville, August 30, 1991); see also Tenn. Code Ann. § 39-2-235 (1986). Similarly, in this case, we are unpersuaded by the State's argument that, "depending on which proof the jury believed, the presumption was either entirely unnecessary or clearly rebutted and inapplicable." Admittedly, if the jury wholly believed the Nicholses' testimony, it could not have applied the presumption set forth in Tenn. Code Ann. § 39-11-611(b), nor could it have applied the justification of self-defense. According to the Nicholses' testimony, Mr. Nichols at no time "forcibly" entered the Davises' front porch[2] or home. Moreover, the Nicholses testified that the appellant provoked any use or attempted use of force by them and never communicated or otherwise indicated an intent to abandon the encounter. See Tenn. Code Ann. § 39-11-611(d). However, according to the appellant's version of the altercation, Mr. Nichols forcibly and without permission entered the appellant's home and began to strike the appellant with a flashlight. Even if the jury believed this account, the question remained whether the appellant reasonably believed that the degree of his response, including his own use of the flashlight, was immediately necessary to protect against Mr. Nichols' use of force. Significantly, the jury's verdicts in this case suggest its unwillingness to wholly accredit the testimony presented by either the State or the appellant concerning the circumstances of this altercation and raise the specter of a "compromise verdict." Accordingly, we cannot conclude beyond a reasonable doubt that an instruction containing the

[2] We note our holding in Edwards, No. 01C01-9007-CR-00171, 1991 WL 165819, at *3 that, for purposes of the predecessor statute to Tenn. Code Ann. § 39-11-611(b), "one's own home or dwelling includes the curtilage thereof."

language set forth in Tenn. Code Ann. § 39-11-611(b) would not have tipped the scales in the appellant's favor.

III.

In light of our resolution of the preceding issue in favor of the appellant, we need not address the appellant's claim that the State violated principles of due process by withholding photographs of the appellant that were taken soon after his altercation with the Nicholses and that displayed his injuries. Nevertheless, we note that the appellant's claim is without merit.

In Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-1197 (1963), the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." See also Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972); Hartman v. State, 896 S.W.2d 94, 101 (Tenn.1995). However, a criminal defendant carries the burden of proving a Brady violation by a preponderance of the evidence. State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995); State v. Spurlock, 874 S.W.2d 602, 610 (Tenn. Crim. App. 1993). In order to carry his burden, a defendant must establish the following prerequisites:

> 1. The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
>
> 2. The State must have suppressed the information;
>
> 3. The information must have been favorable to the accused; and
>
> 4. The information must have been material.

Edgin, 902 S.W.2d at 389; see also Johnson v. State, 38 S.W.3d 52, 56 (Tenn. 2001); Irick v. State, 973 S.W.2d 643, 657 (Tenn. Crim. App. 1998).

We simply conclude that the appellant has failed to establish by a preponderance of the evidence that the State suppressed the photographs in question. On the contrary, the State's response to the appellant's request for discovery clearly states, "The [prosecutor] is in possession of a number of photographs which may be viewed upon a request at a mutually convenient time." We are frankly unconvinced by the appellant's efforts to ascribe to the State defense counsel's negligence in failing to arrange a viewing of the photographs.

That having been said, the appellant also asserts in his brief that the prosecutor's undisputed possession of the photographs requires a conclusion that the prosecutor knowingly elicited false or misleading testimony from the State's witnesses. Specifically, the appellant contends that the photographs directly contradict the Nicholses' testimony that they never assaulted

the appellant. In this regard, we agree with the appellant that, in addition to his obligation under Brady, a prosecutor has both a legal and an ethical obligation to correct false testimony of a prosecution witness and, more broadly, to refrain from using false evidence to convict an accused. Spurlock, 874 S.W.2d at 612; see also State v. Hall, 976 S.W.2d 121, 149 (Tenn. 1998). Additionally,

> [e]ven where defense counsel is aware of the falsity, there may be a deprivation of due process if the prosecutor reinforces the deception by capitalizing on it in closing argument or by posing misleading questions to the witnesses.

Mills v. Scully, 826 F.2d 1192, 1195 (2nd Cir. 1987)(citations omitted); see also United States v. LaPage, 231 F.3d 488, 492 (9th Cir. 2000)("[T]he government's duty to correct perjury by its witnesses is not discharged merely because defense counsel knows, and the jury may figure out, that the testimony is false.").

Nevertheless, we disagree with the appellant that the photographs in question necessarily render the Nicholses' testimony false or misleading. In particular, we note that Mrs. Nichols conceded that a portion of the struggle between her husband and the appellant occurred underneath a table and that she was unable to see underneath the table. Moreover, Mr. Nichols merely testified that, "*other than the actions that [he] testified about attempting to get [the appellant] off of [him]*, . . . [he did not] cause any physical damage to [the appellant.]" Mr. Nichols admitted that he attempted to deflect the appellant's blows. It is not impossible that, in deflecting the appellant's blows and in the confusion of the struggle, Mr. Nichols incidentally struck the appellant's face. Indeed, Mr. Nichols testified that he was partially blinded during much of the struggle. Moreover, Mr. Nichols admitted that, when he finally "grabbed [the appellant] in the groin," the appellant "came up off of me and I heard a big thump and I - - then I realized we were under a table of some kind." This testimony would likewise be consistent with the appellant striking his head or face against the table. In sum, the record does not preponderate in favor of the appellant's serious accusation. Spurlock, 874 S.W.2d at 610.

IV.

For the foregoing reasons, we reverse the appellant's conviction and remand this case to the trial court for a new trial.

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NORMA McGEE OGLE, JUDGE